MISCELLANY.

Liability of National Bank Directors.—In the recent case of Chesebrough et al. *v.* Woodworth, 195 Fed. 875, the Circuit Court of Appeals, Sixth Circuit, holds:

"The making and publishing by a national bank of the reports required by statute are not merely for the information of the comptroller, but are to guide so much of the public as may have occasion to act thereon, and one who buys from another stock in the bank in reliance upon a false report of its condition, and suffers damage thereby has a right of action against any officer or director who, knowing its falsity, authorizes such report, under Rev. St. sec. 5239 (U. S. Comp. St. 1901, p. 3515), which makes them individually liable for damages sustained by the association, its stockholders, 'or any other person.' * * *

"In such an action, where the falsity of the statement consisted in its including as resources in the loans and discounts paper to a large amount which was worthless, the making and publishing of the statement, which under the general custom are merely the automatic result of the bookkeeping, do not constitute the underlying wrong, and any director who participated in or approved the continued carrying on the books of such paper as assets at its face value to an amount sufficient to affect the standing of the bank and knowing its worthlessness is bound to know that under the prevailing practice the statements will be substantially false, and is responsible therefor.

"While the duty of charging off such worthless paper is that of the board of directors as an entity, and in such matter is had a reasonable discretion, when the duty exists and is wholly unperformed, an individual director who is engaged generally in the performance of his functions may be personally liable because of his participation in the failure to act by failing to make reasonable personal efforts to induce the proper action." (Syl.)

And in the recent case of Thomas *v.* Taylor, Lawyer's Co-op. Ad. Sheets (May 1, 1912), p. 403, the Supreme Court of the United States holds:

"The act of directors of a national bank in including as a part of the resources in a report of the condition of the bank, pursuant to a call of the Comptroller of the Currency, assets which had been previously called to their attention by the Comptroller as doubtful, with directions for their immediate collection or removal from the bank, is in effect an intentional violation of the national bank act, knowingly committed, so as to render them liable for a loss resulting to one purchasing, in reliance on such report, stock of the bank on which an assessment is soon after made on announcement by the Comptroller that its capital stock has become totally impaired." (Syl.)

We do not argue the wisdom or the correctness of either of these decisions because until reversed or modified the latter decision stands as the law of the land, and bank directors must govern themselves accordingly; but we think very few directors, particularly those who are directors of national banks outside the largest cities, realize the liability under which they are being held while performing duties as such directors without any compensation whatever, or for compensation that is merely nominal. The legal effect of the decision is to make the directors guarantors of each and every item listed amongst their bank's resources about which they may be informed that any doubt whatever exists on the part of the comptroller, the bank examiner, or any of the other directors.

If such is to be the rule of directors' liability, it would seem no more than fair that they be permited to escape the liability in part by listing doubtful assets as doubtful, which is not now permitted in the forms for statements as required by the comptroller.

Most directors think that the statements as called for by the comptroller and as furnished and published simply show, and are simply intended to show, the condition as shown by the books of the banks at the close of business on the day for which the statement is called. Statements are always called for some past day and the same must be furnished and published as of and for that date, though the directors might have charged off to *Profit and Loss* a very considerable amount of bad paper on the next day.

Directors naturally dislike to charge items off, even if the comptroller has questioned them, until the last ray of hope of ultimate collection has expired, and even then they prefer to charge off in several small amounts rather than one big one; but now let it be understood that all such things are at their personal risk. They are probably guarantors of all questioned items carried as assets and the only thing for them to do is to insist that everything be promptly charged off that has been criticised; though the charging off results in an impairment of the capital sufficient to make an assessment necessary.

Directors of banks, under the peculiar circumstances of the respective cases, have many times been held liable for gross negligence in the management of their banks, Robinson *v.* Hall, 12 C. C. A. (4 Cir.) 674; see note p. 680; Trustees *v.* Bossieux, 3 Fed. 817; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742; Delano *v.* Case, 17 Ill. App. 531; 12 N. E. 676; 121 Ill. 247; Shea *v.* Mabry, 1 Lea 319 (Tenn.); Williams *v.* McKay, 40 N. J. Eq. 189; 18 Atl. 824; 46 N. J. Eq. 25; Marshall *v.* Bank (Va.), 8 S. E. 586; Hun *v.* Cary, 82 N. Y. 65; but we are not aware that the courts have heretofore gone to quite the length of the Supreme Court of the United States in Thomas *v.* Taylor. To our mind it is a considerable advance over previous decisions to hold that the neglect to charge off items criticised by the Comptroller as doubtful is "in effect an intentional violation of the

national bank act, knowingly committed so as to render them liable" for loss resulting to a purchaser of the stock.

Directors are supposed to be allowed a reasonable discretion, but what constitutes such reasonable discretion is for the jury to say; and a bank director stands a poor chance before the average American jury. The director who exercises any discretion whatever is apt to be held personally liable if he makes an error of judgment—some decisions of our courts to the contrary notwithstanding.

Speaking of courts and juries, suggests the following questions: Has the agitation of the recall of judges resulted in getting any of our courts, state or federal, "buffaloed"? Have the recent contemptuous articles in the yellow journals and periodicals resulted in the intimidation of the courts attacked? Is there none among them that dare cite these "red-neck" agitators for contempt?

Yellow journalism, it will be remembered, was largely responsible for the assassination of President McKinley; and it is that same yellow journalism that is now undermining the chief cornerstone of our republic,—our courts,—by attacking every decision, no matter how just, that happens to be in favor of any corporation. The cry that a court "favors the big interests" meets with popular favor amongst the followers of the yellow inter.

We think all officers of national banks will agree that 90 per cent. of the criticisms made by the Comptroller concern loans that are perfectly good and collectible, though some of them may possibly be a little slow. In fact the Comptroller wastes so much time in criticisms that are practically without merit that the recipients treat them with deserved contempt and have a stereotyped answer to the effect that immediate steps will be taken to correct the faults (?) complained of, and then pay no more attention to the matter. If the Comptroller would pay more attention to items that really are questionable and cut out his "roasts" concerning trifles and items that are good, more respect would attach to his criticisms. However these things may be it now behooves directors to protect themselves by promptly charging off each and every item that is the subject of criticism.

The glamor of office as director of a national bank lures many a small stockholder to his undoing, and these recent decisions ought to have a tendency to make stockholders in banks very skeptical of the wisdom of taking office as members of the board of directors. As an abstract proposition men are foolish to risk their fortunes and possibly their liberty for such an empty honor.—The Lawyer and Banker.